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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

In re:

SOUTHERN INYO
HEALTHCARE DISTRICT,

Debtor.

Case No. 16-10015-A-9

Chapter 9

DC NO.: KDG-5

Date: December 19, 2018
Time: 1:30 p.m.
Place: United States Bankruptcy Court
2500 Tulare Street, Fifth Floor
Department A, Courtroom 11
Fresno, California
Judge: Honorable Fredrick E. Clement

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO QUASH OR FOR PROTECTIVE ORDER REGARDING
SUBPOENA TO BAKER HOSTETLER LLP**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Debtor Southern Inyo Healthcare District’s (“Debtor” or “Inyo” untimely filed, unserved Objection to Motion to Quash or for Protective Order (the “Objection”) is wholly unsupported by any evidence, blatantly mischaracterizes the applicable case law and Rules of Professional Conduct, and extensively misportrays the facts. As established in the moving papers, the “substantial relationship” test, which the Objection failed to even mention, makes production and of the Baker invoices unnecessary and improper for this Court’s consideration of the disqualification of Foley and Ms. McDow. The uncontradicted evidence shows, and the Objection admits, that Ms. McDow worked on the Inyo MSA for HCCA. Thus, all that the Court need consider is whether the Inyo MSA is substantially related to these proceedings, in which case Ms. McDow, Mr. Farivar and Foley must be disqualified. The requested invoices add nothing to this analysis.

The Objection provides no basis to deny the Benzeevi Group’s Motion to Quash the subpoena served on Baker Hostetler by Debtor (the “Motion to Quash”).¹ The Objection’s mischaracterization of the controlling case law is extensive. Contrary to Debtor’s argument, in *County of Los Angeles Bd. Of Supervisors*, the California Supreme Court recognizes that the invoices sought from Baker & Hostetler (“Baker”) by Debtor, implicate the heartland of the attorney-client privilege because the matters contained in the invoices, such as the Inyo Management Services Agreement (the “Inyo MSA”), as well as the Vi Healthcare loans, are still the subject of active and ongoing litigation, both in this proceeding and others. Similarly, the filing of the Motion to Disqualify Ashley McDow and Foley & Lardner (the “DQ Motion”) does not waive the attorney-client privilege of Healthcare Conglomerate Associates (“HCCA”), Vi Healthcare Finance (“Vi”), Medflow and Tulare Asset Management (collectively, the “Benzeevi

¹ As ordered by the Court at the November 14, 2018, concurrently with this brief, the Benzeevi Group is submitting a separate brief addressing (1) which old and new Rules of Professional Conduct (“RPC”) are applicable, (2) whether there are differences in the applicable old and new RPC, and (3) if there are differences, whether the new RPC apply retroactively. [Supp. Bedoyan Decl., ¶ 2]. Debtor failed to submit this separate brief as requested and ordered, and only summarily addresses retroactivity in its Objection.

1 Group”) as to communications and legal advice reflected in the Baker invoices.

2 Nowhere does the Objection mention, much less attempt to distinguish, the cases that
3 establish that to determine whether disqualification is warranted, the substantial relationship test
4 precludes inquiry into privileged materials, like invoices. Where, as the Objection admits, “Baker
5 represented HCCA with respect to its entry into the MSA” and Ms. McDow advised “HCCA on
6 the MSA in 2015 and early 2016,” (Objection, p. 3:16-22), this direct involvement triggers the
7 substantial relationship test which simply requires the Court to determine if Foley and Ms.
8 McDow’s representation of Debtor in this proceeding is substantially related to the Inyo MSA.
9 Cases employing the substantial relationship test recognize that the purpose of this test is to
10 protect clients seeking disqualification from having to disclose privileged materials to their
11 adversaries to establish a breach of duty by their former attorney. See, e.g. *H. F. Ahmanson &*
12 *Co. v. Salomon Brothers, Inc.*, 229 Cal.App.3d 1445, 1452-53 (1991)(the substantial relationship
13 test “avoids the ironic result of disclosing the former client's confidences and secrets through an
14 inquiry into the actual state of the lawyer's knowledge and it makes clear the legal profession's
15 intent to preserve the public's trust over its own self-interest.”).

16 Debtor’s attempt to use the exception to privilege provided in Evidence Code § 958 to
17 justify production of the Baker invoices ignores the cases applying the exception, as well as the
18 substantial relationship test. The cases, even those cited by Debtor, recognize that the § 958
19 exception applies only in malpractice actions or fee disputes. Not one case has applied the § 958
20 exception in the disqualification context. To do so would place the former client in the “no win”
21 situation of either allowing its former attorney to breach its fiduciary duties, or waiving privilege
22 to seek disqualification. The substantial relationship test was created to avoid such an absurd
23 result by establishing a presumption of possession of confidential information by a former
24 attorney, without inquiry into privileged materials, when a former representation is substantially
25 related to a current one. Debtor’s misguided attempt to apply Evidence Code § 958 in the
26 disqualification context would render the substantial relationship test a nullity, when it is no such
27 thing, as most recently confirmed in the New California Rules of Professional Conduct. RPC 1.9
28 (a).

1 Finally, Debtor's blatantly inaccurate factual summary, lacks any supportive declaration
2 or documentary evidence, is largely irrelevant to the issues in the Motion to Quash, and must be
3 disregarded. This is especially true as to Debtor's contention that HCCA and Vi waived any
4 possible conflict as to Baker's representation of the Debtor. A review of the actual purported
5 conflict waiver letters (which Debtor apparently is attempting to avoid by not providing or
6 properly referencing them for the Court) demonstrates exactly the opposite; Baker never
7 disclosed, and the clients never consented to, any intent by Baker to continue to represent the
8 Debtor if an actual conflict arose between the Debtor and HCCA or Vi. Instead, Baker disclosed
9 only the opposite, that Baker would continue to represent HCCA and Vi, not the Debtor, if a
10 conflict developed.

11 The Motion to Quash should be granted because, pursuant to the substantial relationship
12 test a review of the Baker invoices is neither necessary, nor permitted, to allow the Court to rule
13 on the DQ Motion.

14 II. RELEVANT PROCEDURAL SUMMARY

15 At the Status Conference on November 14, 2018, when the Court set the briefing schedule
16 and hearing for this motion, the Court clearly ordered that Inyo's opposition was due on
17 December 5, 2018. [Supp. Bedoyan Decl., ¶ 2, Dkt No. 521]. On December 4, 2018, the
18 Benzeevi Group sent a proposal to Inyo in an attempt to partially resolve the issues presented in
19 this motion. [Callas Decl., ¶ 3, Ex. 2]. In this proposal, the Benzeevi Group offered to provide
20 the Baker invoices reflecting the services Ms. McDow and Mr. Farivar provided to HCCA
21 relating to the Inyo MSA on a redacted attorney's eye's only basis to be submitted under seal for
22 purposes of the DQ Motion. [Callas Decl., ¶ 3, Ex. 2]. The proposal also attached the minutes
23 from the January 2, 2016 Inyo Board meeting where the Inyo Board approved the Inyo MSA.
24 [Callas Decl., ¶ 3, Ex. 2]. These minutes were attached to refresh Ms. McDow's recollection that
25 she was the only attorney that appeared at the meeting on behalf of HCCA in relation to the Inyo
26 MSA, that she explained terms of the Inyo MSA as HCCA's counsel, and that she modified terms
27 of the Inyo MSA per the discussion with the Board and its counsel during the meeting. [Callas
28 Decl., ¶ 3, Exs. 2, 3]. To date, Inyo has not responded to this proposal. [Callas Decl., ¶ 3].

III. LEGAL ARGUMENT

A. Debtor's Objection to the Motion was Untimely and Service was Improper

1. The Objection Is Untimely and Should Be Stricken

On November 16, 2018, the Court made its *Order* that any opposition to the motion "is due no later than December 5, 2018." (the "Order") [Dkt. No. 523]. Despite the Order, the *Debtor's Objection to Motion to Quash or Protective Order Regarding Subpoena to Baker & Hostetler LLP* (the "Objection") was not filed by the Debtor until December 6, 2016 at 1:36 a.m. The Court docketed the Objection on December 6, 2018 at 11:22 a.m. [Dkt. No. 529 (Notice of Electronic Filing dated December 6, 2018 2:17 p.m.)].

Rule 9014-1(f)(1)(B) of the Local Rules of Practice for the United States Bankruptcy Court for the Eastern District of California ("Local Rules") provides, "Without good cause, no party shall be heard in opposition to a motion at oral argument if written opposition to the motion has not been timely filed. Failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion or may result in the imposition of sanctions." Under the circumstances, the Debtor's Objection was clearly untimely and should be stricken.

2. The Objection was not Properly Served

In addition to filing the Objection late, the Debtor did not effectuate timely service of the Objection on the moving parties. In fact, to this day the Debtor has not properly served the moving parties. A review of the *Certificate of Service* filed with the Court on December 6, 2018 [Dkt. No. 530] indicates that the Debtor attempted service of the Objection utilizing a procedure which is not allowed by the Local Rules. Specifically, the *Certificate of Service* indicates that the Objection was served or caused to be served by "EMAIL. The following individuals/entities will be served electronically via ECF notification. Listing parties mean that they will be served no later than 24 hours from the date of this service." This is not proper service in this Court. According to Local Rule 7005-1(d), service upon those parties consenting to service by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(E) shall be accomplished "by transmitting an

1 email which includes as a PDF attachment the document(s) served.” Counsel for the moving
2 parties never received an email with a PDF attachment of the Objection as required by the Local
3 Rules. [Supp. Bedoyan Decl., ¶ 3].² This is another example of the Debtor’s disregard for the
4 Court’s orders and the Local Rules. Such behavior should not be condoned, especially since
5 counsel for the Debtor, Ms. McDow, has now been appearing on behalf of the Debtor before this
6 Court for almost the past three years. The Objection should be stricken as untimely and for not
7 having been served properly on the moving parties.

8 **B. Inyo’s Factual Summary Lacks any Evidentiary Support and is Blatantly**
9 **Misleading and Inaccurate**

10 Despite having nearly a month to prepare its untimely filed Objection, the Debtor
11 provided no evidentiary support whatsoever for the statements in its brief. The Debtor failed to
12 provide a declaration or any documents supporting any of the purported “Factual Background,”
13 and did not even bother to properly reference documents submitted by the Benzeevi Group in
14 their Evidentiary Appendix (so that the Court could efficiently read the referenced materials
15 itself). The most likely reason for this failure is clear: any declaration which purported to support
16 many of the statements in the Objection would be false, and any review of the documents vaguely
17 mentioned in the Objection would reveal the Debtor’s material mischaracterization of the content
18 of those documents. The fictional “Factual Background” in the Objection must be disregarded in
19 its entirety.

20 In the first place, the Debtor completely mischaracterizes the actual content of the
21 purported conflict waivers which were clearly described in the DQ Motion (Dkt. No. 486, pp.
22 6:18-26, 9:7-26, 10:6-14, 25:1-26:24), addressed by the Expert Declaration of Robert Kehr (Dkt.
23 No.487, ¶ 4) and attached to the appendix of Exhibits as Exhibits B and D (Dkt. No. 490, pp. 54-
24

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27 ² While Fed. R. Civ. P. 5(b)(2)(E) was amended effective December 1, 2018, to allow for service
28 of a paper on a registered user by filing it with the court’s electronic filing system or sending it by
other electronic means that the person consented to in writing, the method of service prescribed
by Local Rule 7005-1(d) remains the same.

67 65-69).³ A review of these letters establishes that neither HCCA nor Vi ever consented to allow Baker to represent the Debtor, and terminate its representation of the Benzeevi Group, if an actual conflict developed.⁴ The conflict waivers dated January 2, 2016 and July 2, 2017 instead state that Baker “presently represents and expects to continue to represent, the Benzeevi Group in connection with various matters unrelated to the business of the District, and also in connection with the management service agreement between the District and HCCA.” [Dkt. Nos. 488 and 490, (Benzeevi Decl. ISO DQ Mtn), Exs. B, D p. 2, ¶ A]. Indeed, Dr. Benzeevi confirmed his understanding of these letters under oath: “it was my understanding that if an actual conflict developed, Baker would terminate its representation of Inyo and continue representing the Benzeevi Group, including as to the Inyo MSA.” [Dkt. No. 488 (Benzeevi Decl. ISO DQ Mtn), ¶ 4:21-23].

Nowhere in these letters does Baker disclose that Baker could choose to abandon the Benzeevi Group and continue representing the Debtor if an actual conflict developed. Given that Baker was in effect the Benzeevi Group’s general counsel, Dr. Benzeevi would never have given advance consent to allow Baker to abandon the Benzeevi Group and represent the Debtor in direct adversity to HCCA and Vi if an actual conflict developed. [Supp. Benzeevi Decl., ¶ 6]. Furthermore, when the actual conflict did develop, Baker failed to disclose this development and obtain an additional consent, as existing case law required, now further confirmed in the New RPC. *In re Jaeger*, 213 B.R. 578 (Bankr. C.D. Cal. 1997); New RPC 1.7, Comment 2 (“If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).”) Had Baker disclosed the development of an actual conflict, Dr. Benzeevi also would never have given consent to allow Baker to continue representing the Debtor in direct adversity to

³ Debtor and its counsel have had all of the pleadings and evidence relating to the DQ Motion since October 15, 2018 (see Dkt Nos. 484-498) and all of these materials were expressly incorporated by reference in the Motion to Quash. [Dkt. No. 516 (Mtn. to Quash), p. 7:19-25, Dkt. No. 515, Exs. A & B)].

⁴ Since the Motion to Quash was filed Baker has produced a fully signed version of the January 2, 2016 conflict waiver. [Callas Decl., ¶ 5]. This executed version is attached to the Benzeevi Decl. as Exhibit 1.

1 HCCA and Vi. [Dkt. No. 488 (Benzeevi Decl. ISO DQ Mtn), ¶ 11].

2 Thus, the statements made in the Objection that HCCA “waived any conflict that resulted
3 from Baker’s dual representation” and HCCA and Vi “explicitly waived ‘any potential or actual
4 conflict of interest,’” (Objection, p. 4:5, 4:10-11), is false and flies in the face of both the actual
5 language of the letters, Dr. Benzeevi’s testimony under oath, and the law applicable to informed
6 consent and waiver of conflicts.

7 In addition, the Objection falsely minimizes the involvement of Ms. McDow in the Inyo
8 MSA, again without any testimonial or documentary support. However, it is notable that the
9 Objection plainly admits Ms. McDow’s involvement in the Inyo MSA. Under the governing case
10 law cited in the DQ Motion, this admission alone is enough to mandate disqualification of Foley
11 and Ms. McDow (regardless of how she attempts to characterize her involvement). Importantly,
12 the actual evidence before the Court does not show that Ms. McDow’s involvement in the Inyo
13 MSA was limited, as she claims.

14 Dr. Benzeevi’s testimony, uncontradicted by any declaration from Ms. McDow, was that
15 Ms. McDow’s role in the Inyo MSA was substantial. [Dkt. No. 488, (Benzeevi Decl. ISO DQ
16 Mtn.), ¶ 6]. This testimony is corroborated by the January 2, 2016 Board meeting minutes
17 showing that Ms. McDow was the only attorney representing HCCA at the meeting where HCCA
18 sought approval of the Inyo MSA by the Inyo Board and that Ms. McDow explained terms of the
19 Inyo MSA and drafted changes to the Inyo MSA at that very meeting. [Callas Decl., ¶ 4, Ex. 3].
20 Thus, Ms. McDow had material, not limited, involvement *on behalf of HCCA* regarding the Inyo
21 MSA. Ms. McDow’s admitted involvement in the Inyo MSA renders any review of the Baker
22 invoices unnecessary and mandates disqualification, as well as granting the Motion to Quash.

23 Further, Debtor offers no evidence to support the statement that Ms. McDow did not have
24 access to HCCA’s confidential information. [Objection, p. 3:33-25]. Not only did Ms. McDow
25 receive confidential information in working on the Inyo MSA (Dkt. N. 488, (Benzeevi Decl. ISO
26 DQ Mtn.), ¶ 6), but additionally, because Ms. McDow was working with Mr. Greene, the primary
27 Baker partner for the Benzeevi Group, the law *presumes* ““that attorneys, working together and
28 practicing law in a professional association, share each other’s, and their clients’, confidential

1 information.”” *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 847–
2 848 (2006). This is an irrebuttable presumption as a matter of law – therefore, again, no review
3 of the Baker invoices is necessary or warranted for the Court to analyze the basis for
4 disqualification. An irrebuttable presumption, per se, does not require further inquiry, much less
5 the invasive intrusion and disclosure of confidential and privileged information contained in the
6 Baker invoices.

7 Also, Ms. McDow’s contention that the only adverse action that she took was the filing of
8 the Emergency Motion (Objection, p. 4:19-5:1) is demonstrably inaccurate and ignores all of the
9 evidence that the Benzeevi Group offered that Ms. McDow continues to act adversely to HCCA
10 and Vi to this day, including seeking the Benzeevi Group’s privileged and confidential
11 information in the subpoena at issue in this motion, and now *again* repeating the adverse
12 accusations previously made in the Emergency Motion in the Objection. [See, Dkt. No. 486, pp.
13 12:18-14:12, 18:27-19:19 (describing continuing adversity in adversary action, statements made
14 at hearings and mediation positions), Objection, pp. 5:5-14 (repeating adverse statements)].
15 Tellingly, no evidence is offered that Ms. McDow has not and/or is not communicating with
16 counsel for the Debtor in the adversary action. Further, HCCA’s and Vi’s administrative claims
17 as creditors, are still pending. [Dkt. Nos. 406, 447 (Exs. DD and FF to the RJN in support of the
18 DQ Motion)]. These claims are based solely on the amounts owing under the Inyo MSA and Vi
19 loan documents. The Debtor’s interest in resisting these claims is directly adverse to HCCA and
20 Vi, in the same subject matter which Ms. McDow represented HCCA, and adverse to Vi, in the
21 same subject matter that Baker represented Vi. There is no doubt that Ms. McDow and Foley will
22 continue to act adversely to HCCA and Vi to fulfill their duty as counsel for Debtor if they are
23 allowed to continue on as lead insolvency counsel.

24 Relatedly, the contention that the MSA has little or no relevance to this action (Objection,
25 p. 5:24-25) is ludicrous. As stated above, the adversary action focuses on the MSA. Further, as
26 Debtor’s counsel, Foley and Ms. McDow are also at this point responsible for representing
27 Debtor in proposing a plan of adjustment that depends in no small part in objecting to HCCA’s
28

1 administrative claim based solely on the MSA.⁵ Also, in the contemplated global mediation the
2 rights and obligations of HCCA and Debtor under the Inyo MSA will be squarely in issue, not to
3 mention that the global mediation likely will involve discussion of the extent to which Baker
4 committed malpractice in relation to the MSA.

5 The inaccurate and misleading purported Factual Summary, which also lacks any
6 evidentiary support, should be disregarded in its entirety. The uncontradicted evidence submitted
7 by the Benzeevi Group (the evidence in support of the DQ Motion which was expressly
8 incorporated by reference in the Motion to Quash -see Dkt Nos. 486, 488-492, 515, 516) supports
9 granting this Motion to Quash as well as disqualifying Foley and Ms. McDow.

10 **C. The Invoices Are Protected by Attorney-Client Privilege Under the *Los***
11 ***Angeles County Bd. of Supervisors* Decision**

12 The Debtor's contention that the holding of the *Los Angeles County Bd. of Supervisors*
13 decision does not acknowledge attorney-client privilege protection for the Baker invoices rests on
14 the demonstrably false premise that the Inyo MSA is not a pending and active matter. Further,
15 even as to closed matters, the Objection misrepresents the scope of the *Los Angeles County Bd. of*
16 *Supervisors* decision.

17 The *Los Angeles County Bd. of Supervisors* decision clearly recognized that, "**When a**
18 **legal matter remains pending and active, the privilege encompasses everything in an invoice,**
19 including the amount of aggregate fees" *Los Angeles County Bd. of Supervisors v. Superior*
20 *Court*, 2 Cal.5th 282, 297 (2016) (emphasis added). As explained above, the terms of the Inyo
21 MSA and what rights and obligations it created, including whether the transactions disputed in the
22 Emergency Motion were allowed under the agreement remains an active matter in the adversary
23 action as well as in the administrative expense claim and in the mediation. The same is true for
24 Vi, whose administrative claim relating to the loan to Inyo remains pending and is also being
25 addressed in the adversary action. [Dkt. No. 447, RJN, Ex. DD; Dkt. No. 491, RJN, Ex. L].
26 Moreover, as this Court and Foley are well aware, there is a pending investigation by the Tulare

27 _____
28 ⁵ In fact, Debtor's plan depends heavily on not only objecting to the claims arising out of the
MSA, but also objecting to the claim asserted by Vi and seeking affirmative relief against HCCA
and Vi.

District Attorney which addresses the transactions involving Inyo, Tulare Local Healthcare District, HCCA and Tulare Asset Management which implicate terms of the Inyo MSA. These matters are thus pending and active in this respect as to the Benzeevi Group as well, and thus, under *Los Angeles County Bd. of Supervisors*, attorney-client privilege remains intact as to the Baker invoices. The fact that the Benzeevi Group was forced to retain other counsel to represent its rights because Baker abruptly abandoned the Benzeevi Group does not operate to close the matters on which Baker previously represented them, as the identified ongoing disputes amply demonstrate.⁶

The Supreme Court's qualification that "fee totals in matters that concluded long ago" may not be protected by privilege does not apply here. *Los Angeles County Bd. of Supervisors*, 2 Cal. 5th at 298. Even if the matters at issue were concluded in 2017, which as established above they were not, 2017 is not "long ago." Moreover, the *Los Angeles County Bd. of Supervisors* decision states broadly as to *all* invoices, "the content of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose." *Id.* at 300. Indeed, the decision recognizes that it is only the fee totals in invoices from matters closed long ago that may not be protected.⁷

The invoices targeted by the Subpoena contain far more than mere fee totals, but rather

⁶ While it is true that Dr. Benzeevi's professional corporation was dissolved in 2016, all of the other entities formed and represented by Baker, HCCA, Vi, Medflow and Tulare Asset Management remain active. [Supp. Benzeevi Decl., ¶ 7].

⁷

In contrast to information involving a pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation. The fact that the amounts in both cases were communicated in an invoice transmitted confidentially from lawyer to client does not automatically make this information privileged. Instead, the privilege turns on whether those amounts reveal anything about legal consultation. Asking an agency to disclose the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context from which such records are arising—may communicate little or nothing about the substance of legal consultation. But when those same cumulative totals are communicated during ongoing litigation, this real-time disclosure of ongoing spending amounts can indirectly reveal clues about legal strategy, especially when multiple amounts over time are compared.

Los Angeles County Bd. of Supervisors, 2 Cal.5th at 298.

1 reveal detailed information about the services provided, legal strategy, the subject matters of
2 research and analysis, and the specific topic of communications between Baker and Dr. Benzeevi,
3 including but in no way limited to those relating to the Inyo MSA which is currently the subject
4 of much dispute. [Dkt. No. 514, (Bedoyan Decl. ISO Mtn to Quash), ¶ 10]. Thus, under *Los*
5 *Angeles County Bd. of Supervisors*, the Baker invoices are protected by the attorney-client
6 privilege. The Objection cites no other authority for the proposition that invoices are not
7 privileged and did not even bother to address the federal authority cited by the Benzeevi Group
8 providing that information contained in invoices is protected by the attorney-client privilege.
9 Accordingly, under FRCP 45(d)(3)(A)(iii),⁸ the motion should be granted to quash the subpoena
10 in its entirety on the basis that it seeks privileged information.

11 **D. California Evidence Code § 958 Does Not Apply to Disqualification Motions**

12 There is no authority for the proposition that California Evidence Code § 958 applies to
13 disqualification motions. If this were so, every client seeking disqualification would forfeit
14 privilege, because every disqualification is based upon allegations that an attorney has breached a
15 duty of loyalty or confidentiality. Applying Section 958 to create an exception to privilege in
16 disqualification motions flies in the face of long-standing and unassailable authority in both the
17 California state courts and in the federal courts establishing and applying the “substantial
18 relationship” test. *See, e.g., Trone v. Smith*, 621 F. 2d 994, 998 (9th Cir. 1980) (“The relevant test
19 for disqualification is whether the former representation is ‘substantially related’ to the current
20 representation. . . . The test does not require the former client to show that actual confidences
21 were disclosed. That inquiry would be improper as requiring the very disclosure the rule is
22 intended to protect”); *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*,
23 20 Cal.4th 1135, 1146 (1999) (“Where an attorney successively represents clients with adverse
24 interests, and where the subjects of the two representations are substantially related, the need to
25 protect the first client's confidential information requires that the attorney be disqualified from the
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27 ⁸ There is no authority provided for the proposition Rule 45 somehow immunizes an attorney's
28 violation of fiduciary duties and Rules of Professional Conduct in seeking discovery of a former
client's privileged information, just because such a ground is not explicitly listed in Rule 45.
(Objection, p. 11:14-21).

second representation.”). When the “substantial relationship” applies “there cannot be any delving into the specifics of the communication between the attorney and the former client.” *Jessen v. Hartford Casualty Ins. Co.*, 111 Cal.App.4th 698, 709 (2003); *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 847 (2006).

The purpose of the “substantial relationship” test, to presume the possession of confidential information and avoid inquiry into privileged communications between the attorney and former client, would be directly contradicted if Section 958 applied in the disqualification context. No doubt because Evidence Code § 958 and the substantial relationship test are so undeniably irreconcilable, the Objection utterly fails to mention the “substantial relationship” test discussed in the Motion to Quash. [See, Dkt. No. 516, (MMPA ISO Mtn to Quash), 14:20-15:28].

Further, the application of Section 958 has been rejected outside the parameters of malpractice actions and fee disputes. In *Styles v. Mumbert*, 164 Cal. App. 4th 1163, 1166 (2008), an attorney obtained an assignment of a default judgment against his former client and sought to step into the appeal of the default judgment as a party represented by his firm. The attorney asserted that the duty of confidentiality to his former client did not bar his actions because “he should be entitled to reveal confidences to ‘defend himself.’” *Styles, v. Mumbert, supra*, 164 Cal. App. 4th at 1168. Even though there was a separate malpractice case pending, the Court recognized that Evidence Code § 958 did not provide an exception to allow the attorney to substitute into the appeal and reveal privileged information, because the Section 958 exception only applied in a malpractice action or in a fee dispute. *Id.* at 1168

Other cases considering Evidence Code § 958 confirm that it applies only in cases where the client is asserting malpractice claims against an attorney, or the attorney and client are engaged in a fee dispute.⁹ See, e.g. *Anten v. Superior Court* 233 Cal.App.4th 1254, 1256 (2015)

⁹ The Bar Association of San Francisco addressed the applicability of Section 958 in the context of responding to negative online reviews in Ethics Opinion 2014-1. [Callas Decl., Ex. 4 (BASF Opinion 2014-1)]. In that context, the Bar Association recognized that “California courts have generally applied this exception to situation where a client or former client asserts a legal claim against a lawyer, or the lawyer asserts a fee claim against the former client.” [Callas Decl., Ex. 4 (BASF Opinion 2014-1), p. 5].

1 (“*In a lawsuit* between an attorney and a client based on an alleged breach of a duty arising from
2 the attorney-client relationship, attorney-client communications relevant to the breach are not
3 protected by the attorney-client privilege.”) (emphasis added); *Dietz v. Meisenheimer &*
4 *Herron* 177 Cal.App.4th 771, 786 (2009) (“An attorney ‘can reveal confidences to defend against
5 a malpractice claim or in a fee dispute....’”); *Carlson, Collins, Gordon and Bold v. Banducci*, 257
6 Cal.App.2d 212, 228 (1967) (“when, *in litigation between an attorney and his client*, an
7 attorney’s integrity, good faith, authority, or performance of his duties is questioned, the attorney
8 is permitted to meet this issue with testimony as to communications between himself and his
9 client.”) (emphasis added). In such cases, Section 958 allows the attorney to use information in
10 its possession in the prosecution or defense of claims asserted in such actions. As explained by a
11 respected practice treatise:

12 Ev.C. § 958 typically comes into play when a client sues his or her attorney for
13 malpractice or breach of fiduciary duty, or when the attorney sues the client for
14 nonpayment of fees. . . . **Rationale:** When a client or attorney claims the other breached a
15 duty arising out of the professional relationship, it would be ‘unjust’ to allow the claimant
16 to invoke the privilege so as to prevent the other from producing evidence in defense
17 against the claim.

18 Vapnek, Cal. Prac. Guide: Prof. Resp. Ch. 7-C, Attorney-Client Privilege, §§ 7:302-303
19 (Rutter Group 2018).

20 None of the cases cited in the Objection apply Section 958 to a disqualification motion.
21 Instead all the cases which allowed disclosure of confidential information under Section 958,
22 involved actions where the attorney was a party either seeking recovery of fees or defending a
23 malpractice claim. *In re Dimas* involved a fee application in a Chapter 11 proceeding and merely
24 recognizes that an attorney is allowed to disclose privileged communications in attempts to
25 collect its fees. *In re Dimas, LLC*, 357 B.R. 563, 588, (Bankr. N.D. Cal. 2006). The *Gross*
26 *Belsky* decision also involved an attorney’s attempt to recover fees, recognizing that in an “which
27 involves the former client’s breach of its obligation to pay fees,” Section 958 allows an attorney
28 to use confidential information. *Gross Belsky Alonso LLP v. Henry Edelson*, 2009 WL 1505284,
at *3(N.D. Cal., May 27, 2009, No. C 08-4666 SBA). The *Solin* decision was a malpractice action
which held that a client can intervene to dismiss an action brought by a third party against the

1 attorney, if the attorney could only defend its actions by disclosure of confidential or privileged
2 information. *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451 (2001).

3 The *Chevron* and *Columbia Pictures* decisions involved discussion of an implied waiver
4 based on the assertion of an advice of counsel defense, and did not even mention Section 958.
5 *Chevron Corp. v. Pennzoil Co.*, 974 F. 2d 1156, 1162 (9th Cir. 1992); *Columbia Pictures*
6 *Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.* (9th Cir. 2001) 259 F. 3d 1186,
7 1196. In the *Stender* case, where the attorney was being sued for unfair business practices, again
8 there was no discussion of Section 958 and the Court merely held that the case could proceed
9 because disclosure of privileged material was not necessary to the defense of the claim being
10 asserted against the attorney. *People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 650
11 (2012), as modified (Jan. 16, 2013).

12 *In re Rindlisbacher* involved an attorney, a creditor seeking payment of legal fees for
13 work on a dissolution action for the debtor, who filed an adversary complaint to oppose discharge
14 of the debtor. *In re Rindlisbacher*, 225 B.R. 180, (B.A.P. 9th Cir. 1998). The Court actually held
15 that Section 958 *did not* warrant disclosure of privileged information by the attorney in the
16 discharge action, even though the discharge would have affected the attorney's recovery of fees,
17 finding that the discharge proceeding was not related to the attorney's protection of its right to
18 collect fees. *In re Rindlisbacher*, 225 B.R. at 182-83
19 an attorney may reveal confidences and secrets where it is necessary to do so to get paid. .
20 . . The idea behind the exception to the confidences rule for collection of an attorney's fee
is that the client has breached a duty by failing to pay, and the attorney must be able to
defend himself against the client's charges of attorney misconduct.

21 *Id.* at 183.

22 Here, this disqualification motion does not assert a malpractice claim against Foley, nor is
23 it a dispute over fees. The Benzeevi Group makes this motion to prevent Debtor from using the
24 Benzeevi Group's former counsel; it is Debtor's rights, not Foley's or Ms. McDow's rights which
25 are at issue. The "substantial relationship" test and the case law applying Evidence Code § 958
26 mandate that there is no exception to the attorney-client privilege created by seeking
27 disqualification of an attorney. Further, the Benzeevi Group is not using privileged information
28 as a shield or a sword; there is no bar to Debtor offering non-privileged evidence from Ms.

1 McDow, Mr. Farivar or her former firm concerning the general nature of services performed to
2 determine that the services are substantially related to the issues in this proceeding in response to
3 the non-privileged information offered by Dr. Benzeevi in his declaration. Neither Evidence
4 Code § 958, nor the doctrine of implied waiver provide any basis for denying this Motion to
5 Quash.

6 **E. Overwhelming Authority Establishes a Continuing Duty of Loyalty to Former**
7 **Clients**

8 Debtor attempts to validate Ms. McDow's adverse actions (and escape the disqualifying
9 conflict of interest) by claiming that Baker had terminated its representation of the Benzeevi
10 Group prior to undertaking adverse action. This position ignores the well-recognized principle
11 stated in myriad cases in both California and federal courts that the duty of loyalty survives
12 termination and precludes action which would "injure the client in a matter in which [the
13 attorney] formerly represented the client." *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811,
14 821 (2011) (" [The attorney] may not do anything which will injuriously affect [the] former
15 client in any matter in which [the attorney] formerly represented [the client] . . .) (citing
16 *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-74); *Styles v. Mumbert* 164 Cal. App.
17 4th 1163, 1167 (2008) ("an attorney is forever forbidden . . . from acting in a way which will
18 injure the former client in matters involving such former representation."); *In re McIntosh* 697
19 Fed. Appx. 569, 571–572 (9th Cir. 2017) ("Under California law, the duty of loyalty survives the
20 end of the attorney—client relationship; 'after severing his relationship with a former client an
21 attorney 'may not do anything which will injuriously affect his former client in any manner in
22 which he formerly represented him.'"); *In re Jaeger* (Bankr. C.D. Cal. 1997) 213 B.R. 578, 589.
23 [Dkt. No. (Kehr Decl.), ¶ 3].¹⁰

24 ¹⁰ As explained in the accompanying brief, New RPC 1.9(a) incorporates the continuing duty of
25 loyalty owed to a former client, recognized in *Wutchumna* and its extensive progeny.

26 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
27 represent another person* in the same or a substantially related matter in which that
28 person's* interests are materially adverse to the interests of the former client unless the
former client gives informed written consent.

New RPC 1.9(a).

Further, in relevant part, Comment 1 to New RPC 1.9 explicitly states: "After termination

1 In support of its novel proposition that the termination of Baker's attorney-client
2 relationship also terminated its duty of loyalty to the Benzeevi Group, Debtor cites the *SpeedDee*
3 *Oil* decision. (Objection, fn.2). However, the dicta of the *SpeedDee Oil* decision on which Debtor
4 relies merely recognized that the client ended the risk of divided loyalty when the individual
5 attorney terminated his relationship with the prospective client. There was no meaningful
6 analysis of existence of a continuing duty of loyalty, because the client in that case established
7 that the attorney had received confidential information during preliminary consultations and the
8 continuing duty of confidentiality by itself warranted disqualification of both the attorney and his
9 whole firm by imputation. *People ex rel. Dept. of Corporations v. SpeedDee Oil Change Systems,*
10 *Inc.* 20 Cal.4th 1135, 1155-56 (1999).¹¹

11 There can be no doubt that Baker's and Ms. McDow's representation of Debtor in seeking
12 termination of the Inyo MSA, the very agreement Baker and Ms McDow drafted on behalf of
13 HCCA, just two weeks after it abruptly abandoned the Benzeevi Group, was a violation of the
14 continuing duty of loyalty Baker and Ms. McDow owed to HCCA as to the Inyo MSA. Baker
15 and Ms. McDow took direct adverse action in the same subject matter of the previous
16 representation. Ms. McDow's adverse actions, taken in the past as to the Inyo MSA, continue to
17 this day as to the Inyo MSA and Vi. These actions violate her enduring duty of loyalty which
18 justify her disqualification and that of Foley as well. These admissions of adverse action in the
19 Objection provide further support for the conclusion that it is unnecessary and improper to force

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21 of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not
22 (i) do anything that will injuriously affect the former client in any matter in which the lawyer
23 represented the former client . . .

24 ¹¹ Debtor also cites the *Gross Belsky* decision which relied on the same language in *SpeedDee Oil*.
25 In that action, the defendant sought to disqualify a law firm from representing itself in a fee
26 dispute with the defendant who was a former client. That case recognized that disqualification
27 under those circumstances would preclude any attorney from representing itself in a fee dispute.
28 *Gross Belsky Alonso LLP v. Henry Edelson, supra*, 2009 WL 1505284, at *3. Since the case held
that a fee dispute is *not* substantially related to the prior representation for disqualification
purposes, *Gross Belsky* is inapplicable because the continuing duty of loyalty recognized by
Wutchumna, *Oasis West* and the other authority cited above extends to matters that are related to
the former representation.

1 disclosure of the privileged Baker invoices.

2 **F. If the Motion is Denied, the Court Should Limit the Subpoena to the Invoices**
3 **Addressed by the Objection**

4 The Objection focuses on the argument that Debtor and its counsel, Ms. McDow and Mr.
5 Farivar, must obtain the Baker invoices to address the level of involvement they had in the Inyo
6 MSA for HCCA. (See, Objection p.6:2-21). Accordingly, if this Court is inclined to deny this
7 Motion, it should limit the scope of the Subpoena to invoices related to the work on the Inyo
8 MSA. Production and redaction of seven years of invoices on the other myriad manners for
9 which Baker performed services for HCCA and the other entities, is overbroad, burdensome and
10 not even arguably necessary to resolution of the “substantial relationship” test. It would also be
11 highly likely to be prejudicial to the Benzeevi Group, in light of the ongoing disputes already
12 described herein.

13 Since the Debtor does not object to reasonable measures to protect the invoices from
14 public disclosure and use outside of this disqualification motion, the Benzeevi Group requests
15 that any production of invoices be subject to redaction by the Benzeevi Group and designation as
16 attorney’s eye’s only and submission under seal or for *in camera review*.

17 **IV. CONCLUSION**

18 Debtor’s untimely and procedurally defective Objection should be stricken and this
19 Motion granted. However, even if considered, the Objection, offering no evidence of its own,
20 misstates the facts and misrepresents the law. The “substantial relationship” test, wholly ignored
21 in the Opposition, renders an examination of the Baker invoices to determine disqualification of
22 Foley and Ms. McDow unnecessary and improper. Because the uncontradicted evidence
23 establishes, and the Objection admits, that Ms. McDow worked on the Inyo MSA for HCCA, all

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that is left is for the court to determine whether the Inyo MSA is substantially related to these proceedings, in which case Ms. McDow, Mr. Farivar and Foley must be disqualified. Based on the foregoing, the Motion to Quash must be granted.

Dated: December 12, 2018

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